Volume 10 | Number 6 Article 2

3-19-1999

Cases, Regulations and Statutes

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The provision specifies that no solid or liquid waste generated by a housed commercial swine feeding operation is to be applied to land at a rate exceeding, in amount or duration, the "agronomic rate of application."[15] The term "agronomic rate of application" means the "rate of application of nutrients that is necessary to satisfy the plants' nutritional requirements while strictly minimizing the amount of nutrients that run off to surface waters or which pass below the root zone of the plants."[15] The initiative refers to guidance provided by the Colorado State University Cooperative Extension Service for the meaning of the limitations.[16]

The initiative also states that the State Water Quality Control Commission is to promulgate rules, on or before March 1, 1999, requiring that all housed commercial swine feeding operations must "employ technology to minimize to the greatest extent practicable off-site odor emissions from all aspects of its operations, including odor from its swine confinement structures, manure and composting storage sites, and odor and aerosol drift from land application equipment and sites."[17]

The initiative requires that all new or expanded "aerobic process wastewater vessels and impoundments, including but not limited to, treatment or storage lagoons" for housed commercial swine feeding operations be covered so as to minimize the emission of gases into the atmosphere and that all new aerobic impoundments must employ technologies to minimize the emission of odorous gases to the greatest extent practicable.[18]

The provision also requires, on or before July 1, 1999, that all existing "anaerobic process wastewater vessels and impoundments, including but not limited to, aeration tanks and treatment or storage lagoons, owned or operated for use in connection with a housed commercial swine feeding operation" be covered so as to "capture, recover, incinerate, or otherwise manage odorous gases to minimize, to the greatest extent practicable, the emission of such gases into the atmosphere."[19]

Local control

The initiative states that local governments are not precluded from imposing requirements that are more restrictive than those contained in the measure.[20] This is in contrast to the action of the Iowa General Assembly in 1998 in denying local governments a role in regulating animal feeding except as expressly authorized by state law.[21] That action was in reaction to the decision of the Iowa Supreme Court on March 5, 1998 narrowing the authority of counties in dealing with confinement livestock facilities.[22]

The initiative also authorizes "any person who may be adversely affected by a housed commercial swine feeding operation" to enforce the provisions by filing a civil action.[23]

Conclusion

The Colorado provision is believed to be the first attempt at imposing comprehensive state-level requirements on animal feeding operations through a voter initiative. A key question is whether other states, where such initiatives are possible, will follow or whether other states will move legislatively in this direction.

FOOTNOTES

1 Initiative 1997-98 #113, State of Colorado.

2 See generally 6 Harl, *Agricultural Law* § 51.04 (1998) (discussion of state restrictions on corporations including restrictions on hog operations); Harl, *Agricultural Law Manual* § 7.02[1][c] (1998).

3 *Id*.

4 *Id*.

5 Colo. Rev. Stat. §§ 25-8-501.1, 25-7-109, 25-7-138, 25-8-504.

6 Colo. Rev. Stat. § 25-8-501.1(2)(b).

7 *Id*.

8 *Id*.

9 Colo. Rev. Stat. § 25-8-501.1(2)(c).

10 See ns. 6-8 *supra*.

11 Colo. Rev. Stat. § 25-7-138(4)(a).

12 Colo. Rev. Stat. § 25-7-138(4)(b).

13 Colo. Rev. Stat. § 25-7-138(4)(c).

14 McEowen and Harl, "Iowa Court Upholds Property Rights of Landowners and Invalidates Nuisance Protection Law," 9 *Agric. L. Dig*. 165 (1998).

15 Colo. Rev. Stat. § 25-8-501.1(4)(e).

16 *Id*.

17 Colo. Rev. Stat. § 25-7-138(3).

18 Colo. Rev. Stat. § 25-7-138(1).

19 Colo. Rev. Stat. § 25-7-138(2).

20 Colo. Rev. Stat. § 25-8-501.1(9).

21 H.F. 2494, Sec. 9, Iowa General Assembly (1998).

22 Goodell v. Humboldt County, 575 N.W.2d 486 (1998).

23 Colo. Rev. Stat. § 25-8-501.1(8).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

HOSTILE USE. The disputed land was enclosed by a fence which followed a road bordering the property. The land was used as part of the plaintiff's ranch to pasture cattle in the summer for over 20 years. The defendant discovered that the defendant's property included the disputed property when a survey was performed as part of a platting of the defendant's property for purposes of developing a residential subdivision. The defendant approached the plaintiff about the true ownership of the disputed property and the plaintiff offered to either purchase the strip or exchange other property for it. However, nothing was done and the plaintiff's use continued. The court held that the grazing of cattle was sufficient hostile use to support acquisition of the property by adverse possession. The court also held that the discussion between the parties as to ownership and a possible purchase did not defeat the adverse possession claim because the defendant did nothing to make use of the property and did not give the plaintiff permission to use the property. **Hoffman v. Freeman Land & Timber, LLC, 964 P.2d 1144 (Or. Ct. App. 1998)**.

ANIMALS

HORSES. The plaintiff, a ten-year old, participated in a riding program provided by the defendant. The plaintiff's parents signed a release statement which released the defendant from liability for injuries related to horse riding activities, including the handling of horses. The plaintiff was injured while leading a horse out of a corral and the lead rope was struck by another horse. The court held that a question of fact remained as to whether the parties intended the release to apply to the activity at which the plaintiff was injured. The defendant also argued that Ariz. Stat. § 12-533 provided for a statutory release of liability for horse owners when another person takes control of a horse. The court held that an issue of fact remained as to whether the plaintiff had sufficient control over the horse to apply the statute. **Bothell v. Two Point Acres, Inc., 965 P.2d 47 (Ariz. Ct. App. 1998)**.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

EXECUTORY CONTRACTS. The debtor had purchased 279 acres of farmland on an installment contract. The debtor had made equity payments of over $40,000 and made improvements to the property of over $105,000. The debtor was in default on the contract as to installment payments and real estate taxes. The seller argued that the installment contract was an executory contract and that the debtor had to cure all arrearages before assuming the contract. The debtor argued that the contract was a secured transaction which did not require curing arrearages before assumption in bankruptcy. The court held that, under Indiana law, installment contracts were secured transactions. The court held that a land sales installment contract was not an executory contract, especially where the debtor had made substantial payments on the purchase price and improvements to the property. **In re Walker, 227 B.R. 870 (Bankr. S.D. Ind. 1998)**.

SALE OF COLLATERAL. The debtor, a tomato farmer, filed for Chapter 11 but submitted a liquidating plan which was confirmed. The plan provided for abandonment of some property and a lifting of the automatic stay against other property to allow the secured creditor to foreclose against the debtor's land. The plan provided for the sale of the farm equipment and that the debtor would repair and maintain the equipment so as to realize the maximum selling price. The debtor was to be allowed the costs of maintenance and sale of the property from the proceeds as an administrative expense. The proceeds of the sale of all property exceeded the claim of the creditor. The Bankruptcy Court had determined the amount of costs allowed to the debtor and assessed that amount against the secured claim of the creditor. The creditor argued that under the plan, the costs were assessable against the proceeds and did not reduce the secured claim. The District Court agreed. The Bankruptcy Court also had allowed the creditor interest on its claim as determined by the foreclosure judgment which included interest charged from the date of the bankruptcy petition. The District Court reversed, holding that the amount of the creditor's claim was determined as of the petition date and that interest would be allowed on that amount and could not be charged on interest accruing after that date. The appellate court reinstated the Bankruptcy Court decision as to the interest charged on the foreclosure judgment. ***In re* Torcise, 162 F.3d 1084 (11th Cir. 1998), *rev'g*, 187 B.R. 18 (S.D. Fla. 1995)**.

FEDERAL TAXATION-*ALM* § 13.03[7].*

ADMINISTRATIVE EXPENSES. The debtor was a corporation in chapter 7. The plan provided for establishing a liquidating trust to oversee the sale of all assets after confirmation of the plan. Because the value of the assets was less than the secured claims against the assets, no proceeds would be available to pay other claims. The plan made no provision for payment of capital gains from the sale. The debtor argued that any capital gains on the sale of the assets would not be an administrative expense because the sale would occur after confirmation of the plan and no proceeds were available to pay the capital gains tax. The court held that the confirmation of the plan did not stop the administrative period of the case because the sale of the assets was an administrative action. The court also held that the capital gains would be an administrative expense entitled to priority status; therefore, the plan could not be confirmed because it did not provide for payment of all administrative claims. ***In re* Scott Cable Comm., Inc., 99-1 U.S. Tax Cas. (CCH) ¶ 50,288 (Bankr. D. Conn. 1998)**.

DISCHARGE. The debtors first filed for Chapter 13 in July 1992 and the IRS filed claims for 1989, 1990 and 1991 taxes, the returns for which were filed in May 1992. The plan was confirmed but the case was dismissed before the debtors could complete the plan payments. In September 1995, the debtors filed a second Chapter 13 case and sought to have the tax claims for 1989, 1990, and 1991 declared dischargeable. The IRS argued that the three-year period of Sections 523(a)(7)(B) and 507(a)(8)(A)(ii) was tolled during the first Chapter 13 case. The Bankruptcy Court agreed with the debtors that the plain language of the statutes failed to provide any tolling of the limitation period during Chapter 13 cases. The Bankruptcy Court also held that the equities of the case did not favor the IRS because the IRS failed to take action to insure preservation of its claims in the first bankruptcy case. The District Court reversed, holding that the previous bankruptcy cases tolled the three year limitation period. **Matter of Pastula, 227 B.R. 794 (E.D. Mich. 1997), *rev'g*, 203 B.R. 941 (Bankr. E.D. Mich. 1997)**.

The debtors filed for Chapter 12 and the IRS filed a claim for unpaid taxes which included assessments of the 100 percent penalty imposed by I.R.C. § 6672 on responsible persons of a company which failed to pay employment taxes. The debtors argued that the I.R.C. § 6672 amount was a penalty subject to discharge under Section 523(a)(7)(B). The court held that the I.R.C. § 6672 assessment was a tax entitled to priority status and was nondischargeable. ***In re* Mosbrucker, 227 B.R. 434 (Bankr. 8th Cir. 1998)**.

SALE OF RESIDENCE. The debtor filed for Chapter 7 and the trustee sold the debtor's residence. The trustee excluded from the bankruptcy estate's income the gain from the sale of the residence, arguing that the debtor's eligibility for the I.R.C. § 121 exclusion passed to the bankruptcy estate. The Bankruptcy Court allowed the exclusion and the District Court affirmed. Neil Harl will publish an article on this issue in a future issue of the *Digest*. ***In re* Kerr, 99-1 U.S. Tax Cas. (CCH) ¶ 50,310 (W.D. Wash. 1999); *In re* Godwin, 99-1 U.S. Tax Cas. (CCH) ¶ 50,287 (Bankr. S.D. Ohio 1999)**.

CORPORATIONS

SHAREHOLDER LOANS. The debtor had been the sole owner of a corporation which operated a fertilizer business. The debtor had purchased the shares of a co-owner by borrowing funds from the corporation. The loan was recorded on the corporation's books. The debtor then sold the corporation to an employee. The sales agreement had no provision governing the loan. The new owner did not make any attempt to collect on the loan until the corporation was sold to a creditor to satisfy a debt. The court held that the sales agreement governed the rights between the parties and extinguished the loan to the debtor. ***In re* Atkins, 228 B.R. 14 (Bankr. M.D. Fla. 1998)**.

FEDERAL AGRICULTURAL PROGRAMS

ANIMAL WELFARE. The APHIS has announced that it is considering new regulations to be promulgated under the Animal Welfare Act as to the handling, care, treatment, and transportation of farm animals used for nonagricultural purposes (primarily research and exhibition). The APHIS is considering adopting two existing guides: the "Guide for the Care and Use of Agricultural Animals in Agricultural Research and Teaching," published by the Federation of American Societies of Food and Animal Science, and the "Guide for the Care and Use of Laboratory Animals," published by the Institute of Laboratory Animal Resources. **64 Fed. Reg. 10368 (March 3, 1999)**.

HONEY. The FSA has adopted as final regulations implementing the recourse loan program for honey. The regulations are similar to the mohair recourse loan regulations summarized below. **64 Fed. Reg. 10929 (March 8, 1999), adding 7 C.F.R. Part 1469**.

PERISHABLE AGRICULTURAL COMMODITIES ACT. The plaintiffs were unpaid sellers of produce to the defendant buyer. The defendant claimed that both plaintiffs had orally agreed to extend the payment period for the produce beyond the ten day period allowed in the PACA trust regulations but less than the 30 day maximum period allowed by the trust fund regulations. The invoices in all of the sales contained the regulatory language preserving the seller's PACA trust fund rights. The defendant argued that the failure of the plaintiffs to execute a written agreement to extend the payment term beyond ten days caused the plaintiffs to lose any right to seek payment from the PACA trust. The court disagreed, holding that the writing requirement pertained only to the enforceability of the extended payment term and not to the eligibility of a seller to seek payment from the PACA trust, especially where the seller has included written notification on the invoice of the seller's retention of rights under the PACA trust. **Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197 (3d Cir. 1998)**.

MOHAIR. The FSA has adopted as final regulations implementing the recourse loan program for mohair. Eligible loan applicants are "producers" of mohair and not speculators who have purchased the mohair. In general, a loan applicant must have a separate and identifiable interest in both the goats and the mohair. The loan applicant must have been responsible for the financial risk of raising the animal(s) and of producing the mohair, and must have owned, at time of shearing and for the previous 180 calendar days (or less, if the kids are younger), in the United States, the goats from which the mohair was shorn. The 180 calendar day requirement begins to run for imported goats after their quarantine period ends. In any case, regardless of the period the goat is held, loan applicants will be ineligible for a loan if the goats that produced the mohair were imported to provide meat. The loan applicant must also hold a beneficial interest in the mohair collateral until the loan is paid. Under the regulations, such an interest will require that the producer maintains title and control over the disposition of the mohair, as well as the risk of loss on the mohair. Persons handling the marketing of the mohair through a CCC-approved cooperative marketing association (CMA) are also eligible to participate in the loan program, provided the beneficial interest in the mohair remains with the CMA member/loan applicant who shares in the marketing proceeds realized by the CMA. Two or more applicants may be eligible for a joint loan if, as individuals, they would fulfill the eligibility requirements and the commingled mohair is not already under a CCC loan.

With respect to the mohair itself, these regulations apply to mohair produced before and during the 1999 fiscal year. However, mohair that was used to qualify for an incentive payment under the previous mohair payment program, which was terminated by the 1996 FAIR Act, is only eligible to be tendered as collateral for a loan under these regulations if the incentive payment has been repaid to CCC. In addition, the mohair pledged as loan collateral must be stored in a warehouse carrying adequate insurance to cover the mohair and must be contained in standard burlap mohair bags identified by signed and dated receipts and other warehouse records provided by the warehouse.

The loan rate for mohair is $2 per pound. Because certain mohair may not generate sufficient revenue to allow for full loan repayment, CCC is retain a first and superior security interest on all of a loan recipient's existing and future production of mohair, until the loan and all related charges are paid. The security interest will not be restricted to the mohair actually used for calculating the loan amount but shall cover all mohair of the producer. Also, producers will be required to make certain representations concerning loan repayment as may be needed to provide adequate security for the loans with the representations being enforceable by remedies that apply to false or misleading statements made to obtain federal benefits. While the loan is interest-free, interest charges and costs will accrue on amounts outstanding after maturity and may accrue from the date of loan disbursement if it is determined that the producer was ineligible for the loan, committed a loan violation, or obtained the loan on false or misleading pretenses.

In the event that the loan recipient's present production capability is such that a security interest on production is not deemed to be sufficient security, or if the loan is otherwise considered to be insufficiently secured, the CCC may require the loan recipient to agree that 75 cents per pound, or such other amount as may otherwise be deemed appropriate may be deducted from the loan to provide additional security to CCC. Loan recipients, in lieu of such reduction, may provide an acceptable letter of credit, bond, or other form of security for the reduction amount, if approved by CCC. CCC may foreclose on the collateralized mohair and other mohair subject to a security interest and sell it if the loan is not repaid. The government may also pursue other options open to it, including remedies against persons handling loan mohair in disregard of the security interest.

Loans will be made only during the 1999 fiscal year and will mature 12 months after they are made. CCC has determined that the final date to request a loan will be September 30, 1999. Any loan recipient seeking to sell any mohair loan collateral to repay the loan will be required to obtain written authorization from the county office before moving the mohair for sale. If the loan recipient fails to obtain such authorization, or has also provided incorrect certifications or made fraudulent representations, that person will be in violation of the terms and conditions of the loan note and security agreement and will be subject to liquidated damages and other actions in addition to the obligation to repay the loan. **64 Fed. Reg. 10923 (March 8, 1999), adding 7 C.F.R. Part 1434**.

FEDERAL ESTATE AND GIFT TAX

ADMINISTRATIVE EXPENSES. The decedent's estate was assessed the fraud penalty for willful failure to disclose assets of the estate on the estate tax return. The estate sought to deduct the interest on the penalty as an administrative expense. The IRS ruled that the interest on the fraud penalty actually paid or accrued was deductible provided it was allowable as an expense of the estate under local law and the expense was incurred for the benefit of the estate. **FSA 199909009, Nov. 19, 1998**.

GENERATION SKIPPING TRANSFERS-*ALM* § 5.04[6].* The taxpayer held a contingent remainder interest in a trust established before 1985 by a grandparent for the taxpayer's family. The trust corpus will pass to the taxpayer if the taxpayer survives the two individuals who are the measuring lives of the trust. In addition, the taxpayer has a contingent income interest in the family trust that will pass to the taxpayer if the taxpayer should survive the taxpayer's children who are the current income beneficiaries of the trust. Finally, the estate of the taxpayer had a contingent remainder in the trust. This interest would take effect only if the taxpayer died before the taxpayer's family's trust terminates, a power of appointment was not exercised, and all other members of the parent's family subsequently die. The taxpayer transferred these contingent interests to the taxpayer's respective descendants. The taxpayer possessed a special power to appoint the trust among the descendants of the parent. The power takes effect only if the taxpayer predeceased one or both the individuals who are measuring lives of the trust. The taxpayer exercised the testamentary special power of appointment by appointing the assets of the trust to a new trust for the taxpayer's descendants. The special power of appointment would take effect only if the taxpayer dies during the term of the trust. The IRS ruled that (1) the taxpayer's retention of the special power of appointment would not make the trust included in the taxpayer's gross estate; (2) the transfer was a complete gift and was not subject to I.R.C. § 2702; (3) the value of the interest transferred would be determined under I.R.C. § 7520; and (4) the transfers would not subject the trust to GSTT. **Ltr. Rul. 9908022, Nov. 25, 1998**.

MARITAL DEDUCTION-*ALM* § 5.04[3].* The taxpayer had received property in trust from the predeceased spouse's estate. The predeceased spouse's estate had elected to treat the trust as QTIP and claimed the marital deduction for the property. The taxpayer and remainder holders petitioned a state court to terminate the trust and have all the trust property distributed to the taxpayer. The IRS ruled that the termination of the trust and transfer of all property to the taxpayer resulted in a gift of the value of the remainder interest to the taxpayer from the remainder holders. **Ltr. Rul. 9908033, Nov. 30, 1998**.

VALUATION OF STOCK. The decedent held 83 percent of the stock of a corporation which operated a paint manufacturing business. The court allowed a 30 percent discount in the fair market value of the stock for estate tax purposes to account for the lack of marketability of the stock. The court used as a factor in the lack of marketability the potential environmental damage liability of the corporation. The court also approved a 25 percent control premium on the stock. **Estate of Desmond v. Comm'r, T.C. Memo. 1999-76**.

FEDERAL INCOME TAXATION

ACCOUNTING METHOD. The IRS has announced procedures for implementing a change in method of accounting to comply with I.R.C. § 404(a)(11), regarding the payment of deferred compensation. **Notice 99-16, I.R.B. 1999-__, __**.

BAD DEBTS. The taxpayer was the sole shareholder of a corporation which operated a marina. The taxpayer contributed money to the corporation, some of which was memoralized by promissory notes from the corporation. The taxpayer sold the corporation to a third party who required the promissory notes to be canceled. The sales agreement included a provision characterizing the loans as capital contributions by the taxpayer. The Tax Court held that the taxpayer was bound by the characterization of the funds as capital contributions and was not allowed a bad debt deduction for the funds contributed for which promissory notes were issued. The appellate court upheld the Tax Court ruling. **Plante v. Comm'r, 99-1 U.S. Tax Cas. (CCH) ¶ 50,321 (11th Cir. 1999), *aff'g*, T.C. Memo. 1997-386**.

CHILD TAX CREDIT. The IRS has announced that it has found that more than 30,000 taxpayers who checked a box on the front of their tax returns indicating that a dependent was a qualifying child for the child tax credit did not complete the line for the credit on the second page of their returns. The IRS is correcting this oversight and calculating the proper credit amount if it can verify the child's age. If the IRS cannot verify the child's age, the IRS will write to the taxpayer, explaining the discrepancy and asking the taxpayer to file an amended return if the taxpayer is eligible for the credit. **IR-1999-22**.

DISASTER LOSSES-*ALM* § 4.05[2].* The IRS has issued a list of areas declared by the President in 1998 to be adversely affected by a 1998 disaster of sufficient severity and magnitude to warrant Federal assistance. Under I.R.C. § 165(i), the taxpayers in these areas may elect to deduct (if otherwise deductible as a casualty loss or business losses) losses suffered from these disasters in the tax year immediately preceding the tax year in which the disaster occurred. The election is to be made by filing a return, amended return or claim for refund by the later of (1) the due date of the taxpayer's income tax return (not including extensions) for the tax year in which the disaster occurred or (2) the due date of the taxpayer's income tax return (not including extensions) for the tax year preceding the tax year in which the disaster occurred. See Treas. Reg. § 1.165-11(e). **Rev. Rul. 99-13. I.R.B. 1999-__, _**.

DISCHARGE OF INDEBTEDNESS. The taxpayers were corporations in a consolidated group of corporations. Some of the corporations that made up the consolidated group qualified as farmers and some did not. The non-farm corporations were manufacturers and processors of farm products. More than 50 percent of the aggregate gross receipts of the consolidated group were from farming. Some of the non-farm corporation had discharge of indebtedness income. The consolidated group sought to exclude the discharge of indebtedness income at the consolidated level under the qualified farm indebtedness exception, I.R.C. § 108(a)(1)(C). The issue was whether the gross receipts from farming requirement was to be determined at the consolidated group level or on a corporation by corporation basis. The IRS ruled that the exclusions in section 108, including section 108(a)(1)(C), must be determined on a corporation-by-corporation basis. The IRS did not cite any direct authority for the position. **FSA 999-999-86, no date given**.

EXCHANGES. The IRS has issued a revenue procedure which provides for an election that will facilitate the substitution of some or all of the debt instruments from two or more outstanding issues of debt with debt instruments from a new issue. The new debt and the old debt must be publicly traded. Under the election, taxpayers can treat a substitution of debt instruments, in certain circumstances, as a realization event for federal income tax purposes even though it does not result in a significant modification under Treas. Reg. § 1.1001-3 (and, therefore, is not an exchange for purposes of Treas. Reg. § 1.1001-1(a)). Under this revenue procedure, taxpayers do not recognize any realized gain or loss on the date of the substitution. Instead, the gain or loss generally is taken into account as income or deductions over the term of the new debt instruments. **Rev. Proc. 99-18, I.R.B. 1999-__, __**.

HOBBY LOSSES. The taxpayer operated a horse raising, breeding and racing business. The court held that the business was not operated with the intent to make a profit because of the following factors: (1) the taxpayer kept accurate records but did not use them to analyze the profitability of the business; (2) the taxpayer did not prepare a business plan; (3) the taxpayer did not seek expert advice on making the business profitable; (4) the horses did not appreciate in value; (5) the business was never profitable; (6) the taxpayer had income from other sources which was offset by the horse business losses; and (7) the taxpayer received much personal pleasure from the activity. **Pitts v. Comm'r, T.C. Memo. 1999-72**.

INCENTIVE AWARDS. The taxpayer was a manufacturer. The taxpayer awarded prizes of trips worth more than $600 to dealers for successfully carrying a certain amount of the taxpayer's products in inventory. The individuals who took the trips could not compete in the taxpayer's incentive program. Only dealers could meet the criteria and be awarded prizes, and they were the recipients of the trips awarded by the taxpayer. Thus, each trip was a "prize or award" includible in the recipient dealer's gross income under I.R.C. § 74 and constituted a payment of fixed or determinable income under I.R.C. § 6041. However, the dealers which were corporations that received trip awards were not the kind of corporations payments to which were subject to the information reporting requirements of I.R.C. § 6041. The dealers, whether they were proprietorships, partnerships, or corporations, were subject to information reporting requirements when they designated the individuals who would take the trips. The IRS ruled that the taxpayer was required to file information returns under I.R.C. § 6041 for the trips it awarded to noncorporate dealers if the fair market value of a trip awarded was $600 or more in any taxable year. The IRS also ruled that the taxpayer was not required to file information returns with respect to the individuals designated by the dealers to take the trip. **Ltr. Rul. 9909046, Dec. 1, 1998**.

INSTALLMENT REPORTING. The taxpayer manufactured and sold farm equipment. In addition to sales through a network of dealers, the taxpayer made direct sales to farmers. In order to facilitate direct sales of the farm equipment to farmers, the taxpayer offered installment terms for periods of five to seven years at fixed interest rates significantly lower than those generally available to farmers located in areas of the country where the farm economy was doing poorly. In areas of the country where the farm economy was performing well, the taxpayer offered interest rates slightly lower than those available from other sources. Customers were able to obtain lower interest rates by foregoing cash discounts. The taxpayer offered flexible payment schedules structured to accommodate a customer's projected cashflows. I.R.C. § 453(b)(2) provides that the term "installment sale" does not include: any dealer disposition (as defined in I.R.C. § 453(l)); or a disposition of personal property of a kind which is required to be included in the inventory of the taxpayer if on hand at the close of the taxable year. Under I.R.C. § 453(i)(2)(A), the term "dealer disposition" does not include the disposition on the installment plan of any property used or produced in the trade or business of farming (within the meaning of §2032A(e)(4) or (5)). The taxpayer argued that the provision is to be interpreted broadly to include installment sales of property to farmers for their use in the trade or business of farming. The IRS ruled that the taxpayer could not report its installment sales on the installment method. **Ltr. Rul. 9908040, Nov. 6, 1998**.

INTEREST. The IRS ruled that interest earned by a law firm's Interest on Lawyer Trust Account (IOLTA) was not included in the law firm's income where the interest earned was required to be contributed to a charitable foundation established to receive interest from IOLTAs in the state. **Ltr. Rul. 9909032, Dec. 3, 1998**.

Agricultural Law Manual (ALM)..

LIFE INSURANCE. The taxpayers purchased life insurance policies by paying a lump sum premium. The taxpayers then borrowed against the policies an amount greater than the paid premium. The amount borrowed increased because of unpaid interest and the insurance company terminated the policies, paying the taxpayer a small amount that remained the difference between the cash value of the policy and the amount owed on the loans. The insurance company reported gain to the taxpayers from the transactions because the amount of loan satisfied exceeded the premium paid. Noting that very little cash was paid directly to them upon cancellation of the policies, the taxpayers argued that the amounts at issue represented merely "paper transactions" on the books of the insurance companies. They argued that, in borrowing against the policies, they were borrowing their own money, and that capitalized interest on the loans merely increased their investments in the contracts. The court held that the loans were bona fide from the insurance company and were not reported as income by the taxpayers when the loans were made; therefore, the amount the loan exceeded the premium was gain. **Atwood v. Comm'r, T.C. Memo. 1999-61**.

PENSION PLANS. The taxpayer was a shareholder in an S corporation for which the taxpayer performed bookkeeping services. The taxpayer was also a shareholder in two other S corporations but the taxpayer did not perform services for those corporations. The taxpayer determined the allowable Keogh contribution amount by including all the self-employment income from the bookkeeping services for the one corporation with the distributive share of income from the other two corporations. However, the taxpayer did not report the distributive share income as self-employment income. The IRS ruled that the distributive share income could not be included in the calculation of the allowable Keogh contribution amount because the distributive share income was not self-employment income. **FSA 9999-9999-97, no date given**.

RENTAL OF LAND TO ENTITY. In late 1995, the U.S. Tax Court decided a case, *Mizell v. Commissioner, T.C. Memo. 1995-571*, holding that the lease of property to an entity in which the lessor is also an employee or partner may result in treatment of the lease payments as self-employment income. The *Mizell* case involved a crop share lease of land to a family farm partnership. The court focused on the term "an arrangement" in I.R.C. § 1402(a)(1) which encompassed the taxpayer's involvement as a partner as well as involvement under the lease. Later, IRS issued *Ltr. Rul. 9637004, May 1, 1996*, which applied the same analysis to cash rental of land and personal property to a corporation and cited *Mizell* with approval. Legislation has been introduced to change "an arrangement" to "a lease agreement" in I.R.C. § 1402(a)(1). It is suggested that the amendment be enacted inasmuch as a large number of farm and ranch businesses are structured in a manner that assures additional self-employment tax liability. See also Harl, "Renting Land to Family Entity," 7 *Agric. L. Dig.* 157 (1996). **S. 599, H.R. 1044, 106th Cong., 1st Sess. (1999)**.

S CORPORATIONS-*ALM* § 7.02[3][c].*

DISCHARGE OF INDEBTEDNESS. The taxpayer was the sole shareholder of an S corporation. The corporation realized discharge of indebtedness income in a bankruptcy case and excluded the income under the bankruptcy exception of I.R.C. § 108(a). The taxpayer increased the basis of the taxpayer's stock by the amount of discharge of indebtedness income realized by the corporation. The court held, as the Tax Court has done since Nelson v. Comm'r, 110 T.C. 114 (1998), that the taxpayer could not pass-through the S corporation's discharge of indebtedness income where the income was excluded from income under one of the Section 108 exceptions. **Witzel v. Comm'r, T.C. Memo. 1999-64**.

SOCIAL SECURITY TAX. The Internal Revenue Service has issued a warning to taxpayers not to fall victim to a scam offering them refunds of the Social Security taxes they have paid during their lifetimes. The victim pays a "paperwork" fee of $100, plus a percentage of any refund received, to file a refund claim with the IRS. The IRS stated that the law does not allow such a refund of Social Security taxes paid, and the IRS would contact taxpayers filing these claims. Taxpayers who may have been the subject of this hoax or who may have any related information should call the IRS fraud hotline toll-free at 1-800-829-0443. **IR-99-21**.

TAX PROTESTERS. The taxpayer was a Quaker and was employed by a local Quaker society. The taxpayer claimed to be exempt from taxation on the ground that the payment of taxes was against the taxpayer's religious beliefs because some of the taxes were used for the military. The taxpayer argued that the assessment of taxes and penalties violated the Religious Freedom Restoration Act. The court held that Congress had not intended the RFRA to cover religious exemptions to the payment of taxes and penalties. **Adams v. Comm'r, 99-1 U.S. Tax Cas. (CCH) ¶ 50,307 (3d Cir. 1999)**.

SECURED TRANSACTIONS

MERCHANT. The defendant owned a wheat farm which was operated by the defendant's son. The jury found that the son entered into a contract with the plaintiff to sell the plaintiff wheat produced on the farm. A written sales contract was sent to the son but the son did not sign it. The son later sold the grain to another elevator owned by the plaintiff for a higher amount, but the plaintiff withheld the difference between the first and second contracts, arguing that the son had breached the first contract. The defendant argued that the first contract was unenforceable because the son did not sign it. The plaintiff argued that the "merchant" exception to the Statute of Frauds applied to allow enforcement of the contract where the son failed to refute the contract within 10 days after receiving the written copy. The court upheld the jury findings that the son had ample experience with selling grain and noted that the second grain contract contained a provision that the son represented that he was a merchant for purposes of marketing the grain. The court held that the son was a merchant for purposes of the first grain sales contract and that the contract was enforceable without the son's signature. **Smith v. General Mills, Inc., 968 P.2d 723 (Mont. 1998)**.

CITATION UPDATES

***In re* Avila, 228 B.R. 63 (Bankr. D. Mass. 1999)** (discharge in bankruptcy) see p. 33 *supra*.

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